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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 739

UNITED MOTOR SERVICE, INCORPORATED,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

The petitioner, by its attorney, prays that a writ of certiorari issue, to review the judgment of the Court of Claims of the United States entered in this case on November 12, 1940, sustaining respondent's demurrer and dismissing petitioner's petition.

Opinion Below.

The opinion of the Court of Claims (R. 29-35) is reported in 35 F. Supp. 466.

Jurisdiction.

The judgment of the Court of Claims of the United States was entered on November 12, 1940 (R. 35). The jur-

isdiction of this Court is invoked under the Act of February 13, 1925 (c. 229 #3, 43 Stat. 936), as amended by the Act of May 22, 1939 (c. 140, 53 Stat. 752).

Questions Presented.

1. Whether Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934 imposing a capital stock tax for the years ended June 30, 1933 and June 30, 1934, respectively, are so unreasonable, arbitrary, capricious and discriminatory as to violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

2. Whether said Sections of said Act, impose a direct tax in violation of Art I, Sec. 2, Subd. 3, and Art. I. Sec. 9, Subd. 4, of the Constitution of the United States.

Statutes Involved.

This will be found in the Appendix, *infra*, pp. 14-16.

Statement.

The facts as set out in the amended petition, and as admitted by respondent's demurrer (R. 29) are substantially as follows:

This is a suit against the United States for the recovery of capital stock taxes paid by the petitioner for the years ended June 30, 1933, and June 30, 1934 (R. 1-2) and is based upon the ground that Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934, are unconstitutional (R. 17-21).

Petitioner is a Delaware corporation, with its offices and place of business in Detroit, Michigan, engaged in the business of selling automotive parts and accessories, and servicing of automotive vehicles. Plaintiff's entire capital

stock, consisting of 5,000 shares of the par value of $10 per share, has at all times been owned by General Motors Corporation, a Delaware corporation, (hereinafter referred to as General Motors).

During the years 1929 and 1937, there were sharp fluctuations in petitioner's net taxable income, varying from $1,021,272.87 in 1929 down to $259,494.63 in 1932, and up to $1,465,370.92 in 1936. The per cent ratio of net taxable income to net sales varied from 2.08 in 1931 to 5.81 in 1936 (R. 3).

Petitioner paid no dividends in 1933 and 1934 and paid dividends of $1,750,000.00 in 1935, $1,137,500.00 in 1936, and $850,000.00 in 1937 (R. 4). Petitioner's net worth as per its books of account during 1929 to 1937 showed fluctuations from a low of $277,067.88 in 1931 to $727,257.89 in 1933, to $1,308,824.03 in 1934, to $88,238.37 in 1935 (R. 4).

General Motors filed a consolidated income tax return for itself and its subsidiaries (including petitioner), for the year 1933. In determining the values to be declared for capital stock tax purposes for the year ended June 30, 1933, for General Motors and its subsidiaries, it was decided that the total of such declarations of value shall be substantially equal to the capital and surplus of General Motors as of December 31, 1932, or $852,130,000.00, and this total amount was then allocated to General Motors and is subsidiary corporations, on the basis of the relative estimated earnings of General Motors and its subsidiaries for the year 1933. The amount thus allocated to petitioner was $3,120,000.00, which petitioner declared as the value of its capital stock in the capital stock tax return which it filed for the year ended June 30, 1933 (R. 5-6).

For the year ended June 30, 1934, the total declared values for General Motors and its subsidiaries was determined in such amount as on a 12½% return would require net earnings of General Motors and its subsidiaries,

of $2.50 per share on the outstanding common stock of General Motors. The total amount of declared values thus arrived at was $1,004,153,000.00, and this total was allocated to General Motors and its subsidiaries on the basis of the relative estimated earnings of General Motors and its subsidiaries for 1934. There was thus allocated to petitioner the sum of $6,000,000.00, which petitioner declared as the value of its capital stock in the capital stock tax return which it filed for the year ended June 30, 1934 (R. 7).

If petitioner had not been permitted by subsequent Congressional enactments to change the value of its capital stock as declared for the year ended June 30, 1933, it would have been required to pay excess-profits taxes of $11,183.62 for 1934; $4,109.13 for 1935; $129,179.51 for 1936, and $106,-032.22 for 1937 (R. 8-9).

If petitioner had not been permitted by subsequent Congressional enactments to change the value of its capital stock as declared for the year ended June 30, 1934, it would have been required to pay excess-profits taxes of $92,849.51 for 1936, and $68,687.022 for 1937 (R. 9). Based on the declarations of capital stock values for 1934, General Motors was required to pay excess-profits taxes of $2,464,706.06 for 1935, and in addition, its subsidiaries paid excess-profits Taxes of $158,434.53 for 1935. (See Schedule, R. 10-11.)

The consolidated figures for the years 1929 and 1937, show a variation in net sales from a high of $1,504,400,000.00 in 1929, to a low of $432,300,000.00 in 1932, and a variation in net income from a high of $248,280,000.00 in 1929, to a low of $160,000.00 in 1932 (R. 12).

The consolidated earnings per share of General Motors stock outstanding show a variation of earnings of $5.63 for 1929, to a loss of 21 cents per share in 1933, to earnings per share of $5.35 in 1936 (R. 13). The price range of General Motors common stock was a high 91¾ in 1929 and a low of 7⅝ in 1932, and a high of 77 in 1936 (R. 29). Exhibits

"C" and "K" set out certain general economic data for the country for 1929 to 1938 (R. 22-29).

Specification of Errors to be Urged.

The Court of Claims of the United States erred:

1. In failing to hold that Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934, imposing a capital stock tax for the years ended June 30, 1933 and June 30, 1934, respectively, are so unreasonable, arbitrary, capricious and discriminatory as to violate the due process clause of the Fifth Amendment.

2. In failing to hold that said Sections of said Acts impose a direct tax in violation of Art. I, Sec. 2, Subd. 3, and Art I, Sec. 9, Subd. 4, of the Constitution of the United States.

3. In sustaining the respondent's demurrer and dismissing petitioner's petition.

Reasons for Granting the Writ.

1. The Court of Claims of the United States in this case has decided an important constitutional question, which has not been, but should be, settled by this Court.

2. The decisions of the lower courts are in conflict on the question as to whether the value of the capital stock required to be declared by the Acts in question, must have some reasonable relationship to actual or fair value, or whether the declared value is binding on the taxpayer regardless of actual or fair value.

A. In *Oertel* v. *Glenn*, 13 F. Supp. 651, the District Court (W. D. Ky.), in passing upon the capital stock tax provisions of the N.I.R.A., said—"If the Act here in question is construed to raise a conclusive presumption that the tax is to be levied on the declared value of the taxpayer regardless

of the actual value, it is violative of the Fifth Amendment." In *Allied Agents* v. *The United States,* 26 F. Supp. 98, the Court of Claims held that "the actual value is immaterial." In *Kentucky Fire Brick Co.* v. *Glenn,* 34 F. Supp. 35, (W. D. Ky.), the Court expressly rejected the interpretation of the Court of Claims and held "that the purpose of the Act is to impose a tax based on the fair and reasonable value of the stock, rather than upon an arbitrary value fixed by the taxpayer." In the instant case, the Court of Claims held that "while the statute did not require the use of the actual or fair value of the stock, the intent of the statute was that a fair valuation should be stated." In *Oertel* v. *Glenn,* 97 F. (2d) 495, the Sixth Circuit Court of Appeals held that "it is the intent of the statute that constitutes the law."

3. The Court of Claims has decided an important constitutional question in a way probably in conflict with applicable decisions of this Court.